Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1825

SARAH A. ARTHUR, ET AL.,
Appellants,

vs.

CLAY COMMUNITY SCHOOLS, ET AL.,
Appellees.

ROY TOLIN, ET AL.,
Appellants,

vs.

SOUTHWEST PARKE COMMUNITY SCHOOL CORPORATION, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF INDIANA.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

I. PRELIMINARY STATEMENT.

These appeals represent a consolidation of two separate taxpayers' actions by citizens and taxpayers of Clay County, Indiana, and Southwest Parke County, Indiana, and are prosecuted, severally, pursuant to Rule 46 of this Court from orders of dismissal made and entered by the Court of Appeals of

Indiana (First District), denials of their petitions for rehearing before said Court and from orders of the Supreme Court of Indiana denying appellants' petitions for transfer in each of the two cases.

The two cases involve identical questions, and the rulings of the Indiana Court of Appeals (First District) and the Supreme Court of Indiana were identical. A single jurisdictional statement is therefore submitted in accordance with Paragraph 3 of Rule 15 of this Court. This statement is submitted by appellants in support of jurisdiction by the Supreme Court of the United States on appeal and to demonstrate that substantial constitutional questions were presented which were never ruled upon in the Courts below.

Counsel for appellants appeared on behalf of the plaintiff-appellants in both the Parke County school case and the Clay County school case, and identical issues were raised, with minor exceptions, in both cases.

In the event the Court should determine that these two appeals are not properly submitted under 28 U. S. C. Section 1257(2), appellants request that the Court treat this matter as a Petition for Writ of Certiorari pursuant to 28 U. S. C. Section 1257(3) and the Rules of this Court.

II. JURISDICTION.

Identical actions were instituted by appellants in the Parke Circuit Court, Parke County, Indiana, and in the Clay Circuit Court, Clay County, Indiana, pursuant to I. C. Sections 34-4-17-1 through 34-4-17-8, Title 34, pages 776 through 781, designated as the Public Lawsuits Act. Appellants are citizens and taxpayers of their respective counties and in the cases below, sought to challenge the location, wisdom, feasibility, extent and character of constructing and financing new school buildings and the remodeling of existing school structures which were authorized by the respective school trustees, appellees herein.

The Circuit Court of Parke County entered judgment on plaintiffs' amended complaint in an interlocutory proceeding adverse to appellants on the 6th day of July, 1977, and the Circuit Court of Clay County entered judgment on plaintiffs' amended complaint, also adverse to appellants, on the 14th day of November, 1977. The Parke Circuit Court entered an order requiring plaintiffs to post bond in the sum of $300,000.00, and the Clay Circuit Court ordered appellants to post bond in the sum of $926,610.00. The principal sums of said bonds were to be payable to appellees for all damages and costs in the event appellees eventually prevailed on the merits.

From these interlocutory orders, appellants timely sought to secure judicial review by the Court of Appeals of Indiana (First District) as provided by I. C. Section 34-4-17-5. The respective appellees thereupon filed motions to require the appellants to post bond or suffer dismissal without a review. The appellants responded to the rule to show cause. The Indiana Court of Appeals sustained the respective motions of the appellees and ordered appellants to file bonds by a date certain, and on appellants' failure to post said bonds on said dates, the Appellate Court entered orders dismissing the appeals. None of the orders are reported in any official or unofficial publication. The order in the Parke County case to post bond was entered on the 20th day of December, 1977. The order dismissing the appeal by the Court of Appeals of Indiana in the Parke County case was entered on the 24th day of January, 1978 (App. I). The order in the Clay County case to post bond was entered on the 20th day of December, 1977, and the order dismissing the appeal by the Court of Appeals of Indiana was entered on the 24th day of January, 1978 (App. II). Appellants thereupon filed their petitions for rehearing with the Court of Appeals of Indiana (App. III and App. IV, Parke and Clay cases respectively), which were denied by orders entered on the 13th day of February, 1978, and the 27th day of February, 1978 (App. V and App. VI, Parke and Clay cases respectively),

neither of which are reported in any official or unofficial publication.

Appellants timely filed petitions for transfer to the Supreme Court of Indiana (App. VII and App. VIII, Parke and Clay cases respectively), which petitions were denied by unpublished orders on the 4th day of May, 1978, and the 29th day of March, 1978 (App. IX and App. X Parke and Clay cases respectively). Notices of appeal (App. XI and XII, Parke and Clay cases respectively) to this Court were filed in the Supreme Court of Indiana and on all parties of record in each of said actions and upon the Attorney General of Indiana.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(2). Cases sustaining the jurisdiction of this Court include *United Airlines, Inc.* v. *Mahin* (1973), 410 U. S. 623, 93 S. Ct. 1186 and *Street* v. *State of New York* (1969), 394 U. S. 576, 89 S. Ct. 1354.

III. CONSTITUTIONAL, STATUTORY AND INDIANA RULES INVOLVED.

The Fourteenth Amendment to the United States Constitution, relevant to the issues presented, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C.A. Constitution Amendments 13-14, p. 33.)

The relevant portions of the Public Lawsuits Act of Indiana, I. C. Sections 34-4-17-1(b), 34-4-17-5 and 34-4-17-6 read as follows:

"34-4-17-1. Definitions.—

* * * * *

(b) 'Public lawsuit' shall mean any action whereby the validity, location, wisdom, feasibility, extent or character of construction, financing or leasing of any public improvement by any municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin such construction, financing or leasing, and shall mean any action to declare invalid or enjoin the creation, organization or formation of any municipal corporation. This definition, as used in this act, shall not be construed to broaden any right of action as is now validly limited by applicable law." (Burns Indiana Statutes Annotated Title 34, p. 776.)

"34-4-17-5. Interlocutory hearing.—At any time prior to the final hearing in a public lawsuit, the defendant may petition for an order of the court that the cause be dismissed unless the plaintiff shall post a bond with surety to be approved by the court payable to defendant for the payment of all damages and costs which may accrue by reason of the filing of the lawsuit in the event the defendant prevails. A hearing shall be had on such petition in the same manner as the hearing on temporary injunctions under IC 1971 34-1 (formerly Acts 1881 (Spec. Sess.) ch. 38). * * * Either plaintiff or defendant may appeal such order to the Indiana Supreme Court within such ten (10) day period by notice of appeal and a statement of error in the same manner as is provided in a petition for mandate or prohibition. * * *

* * * * *

* * * The Supreme Court may stay the lower court order pending its own decision, may set a bond to be filed by the plaintiff in connection therewith, may modify the order of the lower court, or may enter its order as a final order in a case.* * *."

"34-4-17-6 Appeals from final judgment.—Appeals from any final judgment on a public lawsuit shall be governed by, and taken in the same manner and with the same time limits, as appeals from interlocutory orders of a cir-

cuit or superior court under applicable law,* * *." (Burns Indiana Statutes Annotated Title 34, pp. 778-780.)

Appellate Rule 6(B) of the Indiana Rules of Appellate Procedure, which has the force and effect of law, provides in part as follows:

"(B) Bonds in Appeals. No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order. Enforcement of a judgment or appealable interlocutory order, however, will be suspended during appeal upon the giving of an adequate bond with approved sureties.* * *."

Appellate Rule 4 applicable hereto provides as follows:

"(A) Appeals from Final Judgments. Appeals may be taken by either party from all final judgments of Circuit, Superior, Probate, Criminal, Juvenile, County, and where provided by statute for Municipal Courts.* * *."

The financing for the Parke School project was by lease-rental agreement authorized by statute, the relevant portion of which reads as follows:

"* * * Upon the filing of any such petition the county auditor shall immediately certify a copy thereof, together with such other data as may be necessary in order to present the questions involved, to the state board of tax commissioners, and upon the receipt of such certified petition and information, the state board of tax commissioners shall fix a time and place for the hearing of such matter which shall not be less than five (5) nor more than thirty (30) days thereafter, and said hearing shall be held in the school corporation or corporations, or in the county where such school corporations are located. Notice of the hearing shall be given by the state board of tax commissioners to the members of the board of school trustees, advisory board or governing body or bodies of such school corporation or corporations, and to the first fifty (50) taxpayer-petitioners upon such petition by a letter signed by one (1) member of the state board of tax commissioners, and inclosed with full prepaid postage addressed to such persons at their usual place of residence,

at least five (5) days before the date of such hearing. The decision of the state board of tax commissioners on such appeal, upon the necessity for the execution of said lease and as to whether the rental is fair and reasonable, shall be final.* * *." (Burns Indiana Statutes Annotated Title 21, I.C. 21-5-11-7, p. 484.)

The financing for the Clay School project was by lease-rental agreement authorized by statute, the relevant portion of which reads as follows:

"* * * Upon the filing of any such petition the county auditor shall immediately certify a copy thereof, together with such other data as may be necessary in order to present the questions involved, to the state board of tax commissioners, and upon the receipt of such certified petition and information, the state board of tax commissioners shall fix a time and place for the hearing of such matter which shall not be less than five (5) nor more than thirty (30) days thereafter, and said hearing shall be in the school corporation or corporations, or in the county where such school corporations are located. Notice of the hearing shall be given by the state board of tax commissioners to the members of the board of school trustees, advisory board or governing body or bodies of such school corporation or corporations, and to the first ten (10) taxpayer-petitioners upon such petition by a letter signed by one (1) member of the state board of tax commissioners, and inclosed with full prepaid postage addressed to such persons at their usual place of residence, at least give (5) days before the date of such hearing. The decision of the state board of tax commissioners on such appeal, upon the necessity for the execution of said lease and as to whether the rental is fair and reasonable, shall be final. * * *." (Burns Indiana Statutes Annotated Title 21, I.C. 21-5-12-7, pp. 495-496.)

The relevant provisions of the Indiana Constitution read as follows:

ARTICLE 1, SECTION 1

"Natural rights.—WE DECLARE, That all men are created equal; that they are endowed by their CREATOR

with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government." (Burns Indiana Statutes Annotated, *Constitutions*, Code Edition (1978), p. 1.)

ARTICLE 1, SECTION 12

"Courts open—Due course of law—Administration of justice.—All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." (Burns Indiana Statutes Annotated, *Constitutions*, Code Edition (1978), p. 21.)

ARTICLE 1, SECTION 23

"Privileges equal.—The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." (Burns Indiana Statutes Annotated, *Constitutions*, Code Edition (1978), p. 94.)

IV. QUESTIONS PRESENTED.

1. I. C. Section 34-4-17-5 permits plaintiffs in a public lawsuit to appeal from an interlocutory order requiring them to post bond payable to the defendant for all damages and costs if the defendant prevails. This section provides in part that said court "* * * may set a bond to be filed by the plaintiff in connection therewith * * *" and if bond is set by the court and "* * * no bond is filed as provided in this section, the public lawsuit shall be dismissed. * * *." Appellate Rule 6(B) of the Indiana Rules of Appellate Procedure expressly provides,

"No appeal bond shall be necessary to perfect an appeal from *any* judgment or *appealable interlocutory order.*" (Emphasis added). One of the issues here presented is whether a plaintiff in a public lawsuit can be required to post bond as a condition precedent to perfecting an appeal of the very order requiring the bond to be posted, whereas all other litigants can perfect an appeal and secure a hearing on the merits without posting a bond on appeal. This statutory requirement contravenes the relevant Indiana statutes set forth above and the due process and equal protection laws provisions of the Fourteenth Amendment to the United States Constitution.

2. The provisions of I. C. Sections 21-5-11-7 and 21-5-12-7 violate the applicable provisions of the Indiana constitution set forth above and the Fourteenth Amendment to the United States Constitution because said statutes prohibit an appeal to the courts from the state board of tax commissioners.

3. The requirement imposed upon appellants to post bond as a condition precedent to perfecting their appeals when the posting of such bond was demonstrated to be impossible violates appellants' rights of appeal under the Indiana and Federal Constitutions.

4. The orders of dismissal by the Court of Appeals and the denials of appellants' petitions to transfer to the Supreme Court presented pivotal and substantial questions which imposed a duty upon said courts to give a statement in writing of each question arising in the record, and the omission so to do constituted a violation of Article 7, Section 5 of the Constitution of Indiana and of the Fourteenth Amendment to the United States Constitution.

5. The orders of the Court of Appeals and of the Supreme Court of Indiana contravened Article 1, Section 23 of the Indiana Constitution and of the Fourteenth Amendment to the United States Constitution by denying to appellants the privilege afforded to all other litigants by virtue of Appellate Rule 6(B) by imposing a bond requirement in a public lawsuit.

V. STATEMENT OF THE CASE.

The trustees of the Southwest Parke Community School Corporation and the Clay Community Schools each adopted resolutions to construct new high schools, abandon existing schools and to remodel existing school facilities. Pursuant to statute, the Southwest Parke School trustees entered into a lease-rental agreement with a not-for-profit public holding corporation to finance the project. The Clay Community Schools entered into a lease-rental agreement with a for profit leasing corporation to finance their project. In each instance, the proposed leases were required to be submitted to the state board of tax commissioners if objections to the execution of said leases were filed. Hearings were had before the state board of tax commissioners who approved the proposed leases without special findings of fact or conclusions of law. Thereafter, public lawsuits were timely instituted in both cases under the provisions of I. C. Section 34-4-17-5. A total of approximately 5,000 plaintiffs joined in both actions in opposition to the building programs. The defendants in the public lawsuits requested interlocutory bond hearings and hearings were had. In both cases the trial court ordered plaintiffs to post bond. Bond in the Parke School case was fixed in the amount of $300,000.00, and bond in the Clay School case was fixed in the amount of $926,610.00. Plaintiffs in said actions, being unable to meet the bond requirements, initiated appeals to the Court of Appeals of Indiana. On appeal, the defendants both filed petitions to require appellants to post bond to perfect their appeal on penalty of dismissal without a hearing on the merits. The Court of Appeals of Indiana, in each case, sustained appellees' motions, ordered appellants to file bonds by a date certain and when appellants were unable to procure the required bonds, the Court entered orders dismissing both appeals without a determination on the merits. The constitutional questions presented by the dismissal of the appeals first arose when the appellees filed their petitions to

require appellants to post bond. Appellants thereupon filed petitions for rehearing in which the constitutional questions were reargued. The Court of Appeals of Indiana denied the respective petitions for rehearing without opinion. The appellants then filed petitions to transfer to the Supreme Court of Indiana, and the petitions were denied without a hearing and without opinions. The constitutional questions with respect to the dismissal of the appeals were also presented to the Supreme Court of Indiana but were summarily denied.

VI. HOW THE FEDERAL QUESTIONS WERE RAISED.

The following Federal questions were raised but not decided in the state courts in the following manner:

1. Plaintiffs, in the Parke School case, alleged in rhetorical paragraph 6 of Count I the following:

> "* * * That the provisions of I.C. 21-5-11, et seq., violate the Indiana and Federal Constitutions in that they prescribe a manner of filing petitions or remonstrances but under the provisions of I.C. 21-5-11-7 the decision of the State Board of Tax Commissioners is final and no further appeal is permitted. Since the Indiana statute prohibits an appeal to the courts from the State Board of Tax Commissioners, this violates the Fifth and Fourteenth Amendments to the United States Constitution. * * *."

Plaintiffs in the Clay School case alleged in their amended complaint in rhetorical paragraph 9 of Count II the following:

> "That the provisions of I.C. 21-5-12-7 violate the Indiana and Federal constitutions in that they make the decision of the State Board of Tax Commissioners final and preclude judicial review thereof by the Courts."

2. Substantially the same constitutional questions as those set forth in paragraph 1 above were also raised by said plaintiffs in rhetorical paragraph 10 of the Specific Assignment of Errors Alleged, which was filed in the Court of Appeals.

3. Plaintiffs, in their response to the order of the Court of Appeals of Indiana to show cause why the appeal should not be dismissed for failure to post the bond ordered by the trial court, contended that the Indiana courts could not constitutionally require plaintiffs to file a bond as a condition precedent to secure appellate review for the reason that such a requirement to post bond would be impermissible under the provisions of the Fourteenth Amendment to the United States Constitution.

In their response to the Court's order to show cause, plaintiffs demonstrated that all appellants in Indiana are entitled to appellate review without posting a bond and that the requirement that taxpayers in a public lawsuit do so in order to secure appellate review when all other litigants, including those who do not have property or pay taxes, are not required to post such a bond would violate both the due process and equal protection clauses of the United States Constitution.

4. Plaintiffs, in their petition for rehearing filed in the Court of Appeals of Indiana, raised the following issues:

> "That the order of this Court denies appellants the right of appeal as provided by I.C. Section 34-4-17-6, Appellant Rule 4(A) and 4(B) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution, * * * and in violation of Appellate Rule 6(B)."

Plaintiffs further contended that the Court's order requiring plaintiffs to post bond before their appeal could be perfected:

> "* * * would result in the issues in the trial court being rendered moot. Thus, appellants have no right of appeal at all since they either must suffer dismissal for noncompliance with the order * * * or suffer dismissal because compliance rendered the appeal moot. Such a Hobson's choice violated the constitutional guarantee to the taxpayers under both the Indiana and Federal Constitutions. * * *."

5. In their petitions for rehearing in the Court of Appeals, plaintiffs demonstrated that it was impossible for them to post a bond of the magnitude required and that requiring plaintiffs to perform an impossible act also violated appellants' rights of appeal under the Indiana and Federal Constitutions.

6. Appellants' petition to transfer to the Supreme Court of Indiana presented the following Federal questions:

(a) Appellants were denied an appeal by virtue of the order of the Court of Appeals of Indiana requiring appellants to post bond or suffer dismissal. This order violated rights guaranteed to appellants by both the Indiana and Federal Constitutions. (Paragraph 4(b).)

(b) The orders of the Court of Appeals requiring bond and in dismissing the actions for failure to post bond were unduly burdensome and improperly required appellants to perform an act which appellants had demonstrated they could not do. This deprived appellants of their right of appeal under the Indiana and Federal Constitutions. (Paragraph 4(c)).

(c) The orders of the Court of Appeals denied appellants the right of appeal as provided by I.C. Section 34-4-17-6. Appellate Rule 4(A) and 4(B)(5) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution and in violation of Appellate Rule 6(B).

Inherent in all of the foregoing propositions are provisions of the Indiana Constitution. Article 1, Section 12 thereof provides:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

Article 1, Section 23 thereof provides that:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileg or immunities which, upon the same terms, shall not equally belong to all citizens."

The requirement to post bond in a public lawsuit denied to appellants the privilege afforded to all other litigants by virtue of Appellate Rule 6(B).

VII. THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

The Indiana Public Lawsuits Act represents a major legislative enactment in view of the multiple public works undertaken by the various governmental units of the State of Indiana. The questions here presented have never been passed upon by any of the courts of Indiana, and the decisions of the Indiana reviewing courts in these cases were summary in nature and did not address the constitutional issues raised. The act in question was designed to protect the public against a flood of harassing litigation but expressly granted plaintiffs in public lawsuits the right of appeal, without which such act would clearly be unconstitutional under the numerous holdings in Indiana and specific provisions of the Indiana Constitution. Courts cannot arbitrarily take from a taxpayer the long-established right to question the action of public officials borrowing funds and spending such public funds. I. C. Section 34-4-17-5 expressly reserved a taxpayer's right to appellate review in a bond hearing but provided that the Supreme Court may set a bond to be filed by the plaintiff. It is this requirement which renders I. C. Section 34-4-17-5 unconstitutional.

In the Parke School case there were 716 taxpaying remonstrators, out of a total number of taxpayers for the district of 2,499 (nearly 30 percent), and in the Clay School case there are approximately 4,298 plaintiffs in the public lawsuits action, out of a total number of approximately 15,000 persons (over

30 percent). Appellate Rule 4(A) provides, "appeals may be taken by either party from all final judgments * * *." The Public Lawsuits Act, I. C. Section 34-4-17-5, expressly provided for an interlocutory bond hearing and an appeal therefrom. Appellate Rule 6(B), in clear and unambiguous language, provided that, "no appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order." The Indiana Rules of Appellate Procedure have the force and effect of statutory law, and procedural rules and cases decided by the courts have precedent over any statute enacted concerning a procedural matter. I. C. Section 34-5-1-2; *Order of the Supreme Court of Indiana Adopting Rules,* ordered July 29, 1969; *Matter of Public Law No. 305 and Public Law No. 309* (1975), 263 Ind. 506, 334 N. E. 2d 659. The posting of a bond to perfect an appeal is strictly a procedural matter, and Appellate Rule 6(B) therefore supersedes I. C. Section 34-4-17-5. Thus, we have the patent conflict between Appellate Rule 6(B) and the express provisions of I. C. Section 34-4-17-5. All persons, under Appellate Rule 6(B), may perfect an appeal without bond, but all persons in public lawsuits may not perfect an appeal without posting a bond. Article 1, Section 12 of the Constitution of Indiana is a part of the fundamental law of the State and to conform with due process, it is indispensible that statutes provide an opportunity for judicial review. *Warren* v. *Indiana Telephone Company* (1940), 217 Ind. 93, 26 N. E. 2d 399.

Article 1, Section 23 of the Constitution of Indiana provides that:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

I. C. Section 34-4-17-5 is repugnant to this constitutional provision in the light of Appellate Rule 6(B) because the right of appeal without bond belongs equally to all citizens.

Article 1, Section 1 of the Indiana Constitution provides in part:

> "* * * that all power is inherent in the people; and that all free governments are, and of right, ought to be, founded on their authority, and constituted for their peace, safety and well-being * * *."

It was demonstrated in both cases that the citizens and taxpayers who initiated these proceedings could not provide appropriate bonds to comply with either the order of the courts below or of the Court of Appeals of Indiana. The appellants are citizens and taxpayers and not a homogeneous body with group financial security. No taxpayer is going to assume a joint and several obligation imposed by the bond requirements in view of the bond requirement of $300,000.00 in the Parke School case and $926,610.00 in the Clay School case. Accordingly, discrimination against remonstrating citizens and taxpayers against school construction projects under the provisions of the Public Lawsuits Act is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. When an appeal is afforded to all litigants without the necessity of posting a bond to perfect it, except in public lawsuit litigation, then the requirements of I. C. Section 34-4-17-5 are patently capricious and arbitrary and violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Lindsey* v. *Normet* (1972), 405 U. S. 56, 92 S. Ct. 862; *O'Day* v. *George Arakelian Farms, Inc.* (1976), 536 F. 2d 855 (9th Cir.)

This Court, in *Lindsey* v. *Normet, supra,* held that when an appeal is afforded it cannot be granted to some litigants and capriciously or arbitrarily withheld from others without violating the equal protection clause.

Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. If appellate review is provided in all cases, as it is in Indiana, once it is extended a state cannot, by discriminatory limitations, restrict appellate review without violating the right to the equal

protection of the laws. *Robinson* v. *Beto* (1970), 426 F. 2d 797 (5th Cir.); *In Re Brown* (1971), 439 F. 2d 47 (3rd Cir.). A state statute which contravenes the Federal Constitution creates a federal question. *United Airlines Company* v. *Mahin* (1973), 410 U. S. 623, 93 S. Ct. 1186.

I. C. Section 34-4-17-1(b) states:

> " 'Public lawsuit' shall mean any action whereby the validity, location, wisdom, feasibility, extent or character of construction, financing or leasing of any public improvement * * *."

Under these provisions, taxpayers are afforded the *right* to question governmental action—and granted the right to appellate review of such action. The State of Indiana may not constitutionally abrogate such appellate review without violating due process. The questions here posed are substantial under the equal protection and due process clauses because the power to require the posting of a bond necessarily imposes the power to negate the right of the public to challenge a public improvement.

If taxpayers and citizens of school districts are required to post substantial bonds to perfect an appeal, then there can be no restraint upon such governmental agencies. The feasibility and wisdom of the action of school trustees is left solely in their discretion without the ability of interested persons to effectively challenge the determinations thus made. In the Parke School case, at trial, the evidence established that the assessed valuation of all property in the Southwest Parke County School district was approximately $11,000,000.00 and that the cost of the school project approved by the school trustees was $9,300,000.00. In the Clay School case, the assessed valuation, as shown by the evidence, of all property in the County amounted to approximately $42,000,000.00, and the total cost of the project as approved by the school trustees was approximately $44,000,000.00. Decisions of this magnitude which affect every property owner in the county should not be vested solely in the school trustees without review of such decisions for arbitrariness

by the courts. Neither should the State of Indiana be permitted to foreclose appellate review by requiring appellants in a bond hearing to post a bond which a group of citizens could not possibly provide, thereby resulting in frustration of their good intentions to have a voice in the public improvements authorized by the school trustees.

VIII. CONCLUSION.

This appeal presents substantial questions of public importance and appellants respectfully submit that this Court should accept jurisdiction and adjudicate the constitutional questions presented as a guide to all public improvement projects authorized by any governmental agency in the State of Indiana.

The trustees or their nominees in both school corporations who advocated the building programs were defeated for re-election at the election held on the 2nd day of May. The opponents to the building programs elected slates favorable to their position. The term of office of school trustees is four years. The will of the people could very well be frustrated without employing constitutional safeguards for arbitrary and capricious conduct by governmental agencies. The election results further point up that the constitutional questions presented are indeed substantial and merit the consideration of this Court.

Respectfully submitted,

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APPENDIX I.

IN THE COURT OF APPEALS OF INDIANA

First District

ROY TOLIN, GERALD GARRARD, HERSHEL JACKSON, BARRY MORTON, MARVIN CASE and SEBA CASE,
Plaintiffs-Appellants,

vs.

CARLTON L. PHILLIPPI, TAYLOR I. MORRIS, SR., and DURWOOD S. STRANGE, As Commissioners of the State Board of Tax Commissioners of the State of Indiana, and THE SOUTHWEST PARKE COMMUNITY SCHOOL CORPORATION,
Defendants-Appellees.

Cause No. 1-777-A-151

ORDER

This Court, having heretofore on December 20, 1977, issued its Order ordering the appellants to post bond with the Clerk of the Parke Circuit Court in the amount of Three Hundred Thousand Dollars ($300,000.00) with surety to be approved by the Judge of the Parke Circuit Court, payable to the defendants-appellees for the payment of damages and costs which may accrue to defendants-appellees by reason of the filing of this action in the event the appellees prevail, and having further ordered said bond to be posted within 30 days from the date of this Court's Order, failing which this appeal will be

dismissed, which said Order is more particularly in the following words and figures, to-wit:

(H. I.)

And the Court, now being advised that the appellants have failed to post bond within the time as ordered, finds that this appeal should be dismissed.

IT IS THEREFORE ORDERED that this cause be, and the same now is, dismissed.

ORDERED this 24th day of January, 1978.

/s/ JONATHAN J. ROBERTSON
Chief Judge

APPENDIX II.

IN THE COURT OF APPEALS OF INDIANA

First District

SARAH A. ARTHUR, ET AL.,
Plaintiffs-Appellants,

vs.

CLAY COMMUNITY SCHOOLS, ET AL.,
Defendants-Appellees.

Cause No.
1-1177-A-270

ORDER

This Court, having heretofore on December 20, 1977, issued its Order ordering the appellants to post bond with the Clerk of the Clay Circuit Court in the amount of Nine Hundred Twenty-Six Thousand, Six Hundred Ten Dollars ($926,610.00) with surety to be approved by the Clay Circuit Court, payable to the defendants-appellees for the payment of damages and costs which may accrue to defendants-appellees, by reason of the filing of this action in the event the appellees prevail, and having further ordered said bond to be posted within 30 days from the date of this Court's Order, failing which this appeal will be dismissed, which said Order is more particularly in the following words and figures, to-wit:

(H. I.)

And the Court, now being advised that the appellants have failed to post bond within the time as ordered, finds that this appeal should be dismissed.

IT IS THEREFORE ORDERED that this cause be, and the same now is, dismissed.

ORDERED this 24th day of January, 1978.

/s/ JONATHAN J. ROBERTSON
Chief Judge

APPENDIX III.

IN THE COURT OF APPEALS
of the State of Indiana

ROY TOLIN, GERALD GARRARD, HERSHEL JACKSON, BARRY MORTON, MARVIN CASE and SERA CASE,
Appellants (Plaintiffs Below),

vs.

CARLTON L. PHILLIPPI, TAYLOR I. MORRIS, SR., and DURWOOD S. STRANG, As Commissioners of the State Board of Tax Commissioners of the State of Indiana, and THE SOUTHWEST PARKE COMMUNITY SCHOOL CORPORATION,
Appellees (Defendants Below).

No. 1-777A151
Appeal from the Parke Circuit Court

Honorable
Earl M. Dowd,
Judge

APPELLANTS' PETITION FOR REHEARING

Appellants, 716 taxpayers of the Southwest Parke Community School Corporation's taxing unit, respectfully petition the Court to grant a rehearing of the order made and entered by the Court on January 24, 1978, which order sustained appellees' petition to dismiss this appeal, for the following reasons, separately and severally considered:

1. Said order contravenes the express provisions of Appellate Rule 6(B) which does not impose the requirement of the filing of an appeal bond to perfect an appeal from an interlocutory order.

2. That the order of this Court required appellants to perform the very act which the trial court ordered them to perform

and which is the subject of this appeal. As the record demonstrates, this is a public lawsuit, and the trial court ordered bond to be posted; appellants have taken this appeal in order to review the order that bond must be posted by them in the trial court. The effect of this Court's order was to require appellants to moot the appeal by complying with the trial court's judgment before the Court will consider an appeal of the trial court's order. Thus, the Court's order of December 20, 1977, and the dismissal of the appeal on January 24, 1978, renders appeals in public lawsuits impossible since compliance with the Court's order of December 20, 1977, would have resulted in the issues in the trial court being rendered moot. Thus, appellants have no right of appeal at all since they were required to either suffer dismissal for non-compliance with the order of December 20, 1977, or suffer dismissal because compliance therewith rendered the appeal moot. Such a Hobson's choice violates the constitutional guarantee to the taxpayers under both the Indiana and Federal Constitutions as hereinafter set forth.

3. That the Court's orders of December 20, 1977, and the ruling of January 24, 1978, are unduly burdensome and improperly require appellants to perform an act which they have heretofore demonstrated they cannot do. The Court, notwithstanding such showing, has ordered that an impossible task be done or the appeal be dismissed. This, too, deprived appellants of their right of appeal under the Indiana and Federal Constitutions.

4. That the Court's orders of December 20, 1977, and January 24, 1978, contravened the express provisions of Appellate Rule 15(A)(2) in that this Court disposed of this appeal by an order and not by a written opinion or by a written memorandum decision.

5. That the Court's orders of December 20, 1977, and January 24, 1978, contravened the express provisions of Appellate Rule 15(A)(2) in that the order decides a new principle of law without disposition by a written opinion.

6. That the above orders of this Court erroneously decided a new question of law by holding that appellants were required to post a bond to perfect an appeal on penalty of dismissal of the appeal without:

(a) statutory requirement for the posting of such bond;

(b) judicial precedent for the posting of such bond; and

(c) that appeals from interlocutory orders may be perfected without the posting of a bond.

7. That the above orders of this Court failed to give a statement in writing of the following pivotal and substantial questions arising on the record in violation of Article 7, Section 5 of the Constitution of Indiana:

(a) That an appellant in a public lawsuit is required to post a bond to perfect an appeal from an interlocutory order; and

(b) That the Court failed to make a statement in writing by which it is empowered by statute, rule or precedent that the posting of a bond in a public lawsuit is a prerequisite to perfecting an appeal from an order of a lower court requiring the posting of a bond by such appellant.

8. That the above orders of this Court failed to give a statement in writing of the following pivotal and substantial questions arising on the record, and the above orders of this Court failed to give any reasons or statements in writing as grounds for the entry of said orders and particularly:

(a) In omitting to give a statement in writing on appellants' right to perfect an appeal as provided by the Public Lawsuits Act, I. C. Section 34-4-17-6; and

(b) That the above orders of this Court failed to give a statement in writing as respects the applicability of I. C. Section 34-1-58-1 through 34-1-58-6, which does not impose bond requirements to perfect an appeal as in a proceedings for mandate or prohibition.

9. That the above orders of this Court denied appellants the right of appeal as provided by I. C. Section 34-4-17-6, Appellate Rule 4(A) and 4(B)(5) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution, in violation of Article 7, Section 5 of the Indiana Constitution, and in violation of Appellate Rules 6(B).

10. That the above orders of this Court contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that:

> (a) jurisdiction of the Court of Appeals of Indiana may only be exercised under such terms and conditions as the Supreme Court shall specify by rules and that there is no rule of the Indiana Supreme Court which provides for a proceedings for a rule to show cause; and
>
> (b) a single judge of the Court of Appeals has no jurisdiction to enter an order which adjudicates the issues sought to be reviewed on appeal.

11. That the above orders of this Court contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that said orders denied to appellants an absolute right to one appeal.

12. Neither a single judge nor this Court has power to do anything which is not authorized by law and when a procedure is established by a special statute, this Court's judicial functions are controlled thereby, and the remedy provided by such statute is confined to the mode prescribed and the procedure so provided excludes resort to any other or different procedure. The above orders of this Court contravened and negated I. C. Section 34-4-17-6 and Article 7, Section 6 of the Constitution of Indiana.

13. There is no statutory provision in a public lawsuit nor a rule of the Indiana Supreme Court which requires the posting of a bond as a condition precedent to judicial review.

14. That the above orders of this Court contravened Appellate Rule 15(A)(2)(c) in that the orders issued by this Court resolved a legal issue of unique interest and of substantial public importance without disposition by a written opinion by the Court of Appeals.

WHEREFORE, appellants respectfully petition the Court to grant a rehearing on the orders made and entered by the Court on December 20, 1977, and January 24, 1978, for the reasons stated above.

ROSENFELD, WOLFE & FREY
By /s/ ERIC A. FREY
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Attorneys for Appellants

APPENDIX IV.

IN THE COURT OF APPEALS
of the State of Indiana

SARAH A. ARTHUR, ET AL., *Appellants (Plaintiffs Below),* *vs.* CLAY COMMUNITY SCHOOLS, ET AL., *Appellees (Defendants Below).*	No. 1-1177A270 Appeal from the Clay Circuit Court. — Honorable David K. Johnson, Special Judge.

APPELLANTS' PETITION FOR REHEARING

Appellants, 4,298 taxpayers of the Clay Community Schools taxing unit, respectfully petition the Court to grant a rehearing of the order made and entered by the Court on January 24, 1978, which order sustained appellees' petition to dismiss this appeal, for the following reasons, separately and severally considered:

1. Said order contravenes the express provisions of Appellate Rule 6(B) which does not impose the requirement of the filing of an appeal bond to perfect an appeal from an interlocutory order.

2. That the order of this Court required appellants to perform the very act which the trial court ordered them to perform and which is the subject of this appeal. As the record demonstrates, this is a public lawsuit, and the trial court ordered bond to be posted; appellants have taken this appeal in order to review the order that bond must be posted by them in the trial court. The effect of this Court's order was to require appellants to moot the appeal by complying with the trial court's judgment before the Court will consider an appeal of the trial court's order. Thus,

the Court's order of December 20, 1977, and the dismissal of the appeal on January 24, 1978, renders appeals in public lawsuits impossible since compliance with the Court's order of December 20, 1977, would have resulted in the issues in the trial court being rendered moot. Thus, appellants have no right of appeal at all since they were required to either suffer dismissal for non-compliance with the order of December 20, 1977, or suffer dismissal because compliance therewith rendered the appeal moot. Such a Hobson's choice violates the constitutional guarantee to the taxpayers under both the Indiana and Federal Constitutions as hereinafter set forth.

3. That the Court's orders of December 20, 1977, and the ruling of January 24, 1978, are unduly burdensome and improperly require appellants to perform an act which they have heretofore demonstrated they cannot do. The Court, notwithstanding such showing, has ordered that an impossible task be done or the appeal be dismissed. This, too, deprived appellants of their right of appeal under the Indiana and Federal Constitutions.

4. That the Court's orders of December 20, 1977, and January 24, 1978, contravened the express provisions of Appellate Rule 15(A)(2) in that this Court disposed of this appeal by an order and not by a written opinion or by a written memorandum decision.

5. That the Court's orders of December 20, 1977, and January 24, 1978, contravened the express provisions of Appellate Rule 15(A)(2) in that the order decides a new principle of law without disposition by a written opinion.

6. That the above orders of this Court erroneously decided a new question of law by holding that appellants were required to post a bond to perfect an appeal on penalty of dismissal of the appeal without:

(a) statutory requirement for the posting of such bond;

(b) judicial precedent for the posting of such bond; and

(c) that appeals from interlocutory orders may be perfected without the posting of a bond.

7. That the above orders of this Court failed to give a statement in writing of the following pivotal and substantial questions arising on the record in violation of Article 7, Section 5 of the Constitution of Indiana:

(a) That an appellant in a public lawsuit is required to post a bond to perfect an appeal from an interlocutory order; and

(b) That the Court failed to make a statement in writing by which it is empowered by statute, rule or precedent that the posting of a bond in a public lawsuit is a prerequisite to perfecting an appeal from an order of a lower court requiring the posting of a bond by such appellant.

8. That the above orders of this Court failed to give a statement in writing of the following pivotal and substantial questions arising on the record, and the above orders of this Court failed to give any reasons or statements in writing as grounds for the entry of said orders and particularly:

(a) In omitting to give a statement in writing on appellants' right to perfect an appeal as provided by the Public Lawsuits Act, I. C. Section 34-4-17-6; and

(b) That the above orders of this Court failed to give a statement in writing as respects the applicability of I. C. Section 34-1-58-1 through 34-1-58-6, which does not impose bond requirements to perfect an appeal as in a proceedings for mandate or prohibition.

9. That the above orders of this Court denied appellants the right of appeal as provided by I. C. Section 34-4-17-6, Appellate Rule 4(A) and 4(B)(5) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution, in violation of Article 7, Section 5 of the Indiana Constitution, and in violation of Appellate Rule 6(B).

10. That the above orders of this Court contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that:

(a) jurisdiction of the Court of Appeals of Indiana may only be exercised under such terms and conditions as the Supreme Court shall specify by rules and that there is no rule of the Indiana Supreme Court which provides for a proceedings for a rule to show cause; and

(b) a single judge of the Court of Appeals has no jurisdiction to enter an order which adjudicates the issues sought to be reviewed on appeal.

11. That the above orders of this Court contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that said orders denied to appellants an absolute right to one appeal.

12. Neither a single judge nor this Court has power to do anything which is not authorized by law and when a procedure is established by a special statute, this Court's judicial functions are controlled thereby, and the remedy provided by such statute is confined to the mode prescribed and the procedure so provided excludes resort to any other or different procedure. The above orders of this Court contravened and negated I. C. Section 34-4-17-6 and Article 7, Section 6 of the Constitution of Indiana.

13. There is no statutory provision in a public lawsuit nor a rule of the Indiana Supreme Court which requires the posting of a bond as a condition precedent to judicial review.

14. That the above orders of this Court contravened Appellate Rule 15(A)(2)(c) in that the orders issued by this Court resolved a legal issue of unique interest and of substantial public importance without disposition by a written opinion by the Court of Appeals.

15. That the Court of Appeals erred in taking under advisement appellants' petition for enlargement of time within which

to file the record of proceedings in this cause and in failing to grant said petition for enlargement of time. Appellants timely filed their petition for enlargement of time to January 16, 1978, which petition was supported by an affidavit of the Court Reporter to demonstrate that the record could not be filed until at least that time. The Court refused to grant said petition but instead took the same under advisement until the ruling on the motion to dismiss which occurred on January 24, 1978. Appellants would request this Court to grant a rehearing on the ruling refusing to grant the enlargement of time so that appellants are granted sufficient time within which to file the record of proceedings in this cause and perfect their appeal. Appellants would further state that no reasons whatsoever were given by the Court in refusing to grant the enlargement of time sought by appellants and no counter affidavits were filed showing that the record of proceedings was in fact available to be filed prior to the date of the ruling on the motion to dismiss. In fact, as is evidenced by the attached affidavit of Rita Martin, the Court Reporter who is transcribing the testimony in this cause at the hearing on the issue of whether or not bond should be required, the record of proceedings is still unavailable for filing and a further enlargement of time will be required in order to complete the preparation and filing of proceedings in this cause.

WHEREFORE, appellants respectfully petition the Court to grant a rehearing on the orders made and entered by the Court on December 20, 1977, and January 24, 1978, for the reasons stated above.

ROSENFELD, WOLFE & FREY
By /s/ ERIC A. FREY
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410 Star Building
Terre Haute, Indiana 47808
Telephone: (812) 232-9691
Attorneys for Appellants

IN THE COURT OF APPEALS
of the State of Indiana

SARAH A. ARTHUR, ET AL., *Appellants (Plaintiffs Below),* *vs.* CLAY COMMUNITY SCHOOLS, ET AL., *Appellees (Defendants Below).*	No. 1177A270 Appeal from the Clay Circuit Court. — Honorable David K. Johnson, Special Judge.

STATE OF INDIANA } SS:
COUNTY OF CLAY }

AFFIDAVIT

Rita Martin, being first duly sworn upon her oath, deposes and says:

1. That she is the duly appointed and acting Court Reporter of the Clay Circuit Court and recorded the testimony and evidence presented at the hearing in the above-captioned matter upon the issue of whether or not bond should be required by appellants.

2. That due to the press of other business, the undersigned has been unable to complete the transcript of said evidence, and it will not be possible to file the record of proceedings in this cause until on or about April 10, 1978.

Further affiant saith not.

/s/ RITA MARTIN
Rita Martin

SUBSCRIBED AND SWORN TO before me this 7th day of February, 1978.

/s/ ERIC A. FREY
(Seal) *Notary Public*

My Commission Expires: May 11, 1981.

APPENDIX V.

IN THE COURT OF APPEALS
of the State of Indiana

Appellants ~~appellees~~ petition for rehearing denied ~~granted~~ this 13th day of February 1978.

/s/ JONATHAN J. ROBERTSON, *C. J.*

APPENDIX VI.

IN THE COURT OF APPEALS OF INDIANA
First District

SARAH A. ARTHUR, ET AL.,
Appellants (Plaintiffs Below),

vs.

CLAY COMMUNITY SCHOOLS, ET AL.,
Appellees (Defendants Below).

Cause No.
1-1177-A-270

ORDER

This cause pending before the Court on the Motion of the Appellee Clay Community School Corporation to Dismiss Attempted Appeal; on the Appellants' Petition for Rehearing addressed to the Order of this Court entered January 24, 1978, which dismissed this appeal; on the Petition for Leave to Withdraw Appearance filed by Gus Sacopulos, one of the attorneys for appellants herein; and on the Motion to Strike Pleading filed by appellee Clay Community Schools addressed to the Appellants' Petition for Rehearing, all of which are more particularly in the following words and figures, to-wit:

(H. I.)

And the Court, having examined all of these matters, having judicial knowledge of its own records, and being duly advised in the premises, now finds that its Order heretofore issued in this cause on January 24, 1978, dismissing this cause constitutes a final disposition of this cause which is subject to review in this Court by a Petition for Rehearing and after denial of rehearing is subject to review by the Supreme Court of Indiana on a Petition to Transfer.

The Court further finds that the Motion to Dismiss filed by appellee Clay Community School Corporation on February 1, 1978, after this cause had previously been dismissed, presents no issue for consideration and should be denied. The Court further finds that Appellants' Petition for Rehearing should be denied and Appellee's Motion to Strike Appellants' Petition for Rehearing should be denied. The Court further finds that the Petition for Leave to Withdraw Appearance should be granted.

IT IS THEREFORE ORDERED as follows:

1. The Motion to Dismiss Attempted Appeal filed by the appellee Clay Community School Corporation on February 1, 1978, is denied;

2. The Appellants' Petition for Rehearing filed February 9, 1978, addressed to this Court's Order of January 24, 1978, dismissing this appeal is denied;

3. The Motion to Strike Pleading filed by appellee Clay Community Schools addressed to the Appellants' Petition for Rehearing is denied;

4. The Petition for Leave to Withdraw Appearance filed by Gus Sacopulos, one of the attorneys for appellants is granted.

All of which is ORDERED this 27th day of February, 1978.

/s/ JONATHAN J. ROBERTSON
Chief Judge

APPENDIX VII.

IN THE SUPREME COURT
of the State of Indiana

ROY TOLIN, ET AL., *Appellants (Plaintiffs Below),* *vs.* CARLTON L. PHILLIPPI, TAYLOR I. MORRIS, SR., and DURWOOD S. STRANG, as Commissioners of the State Board of Tax Commissioners of the State of Indiana, and THE SOUTHWEST PARKE COMMUNITY SCHOOL CORPORATION, *Appellees (Defendants Below).*	No. 1-777A151 Appeal from the Parke Circuit Court. Honorable Earl M. Dowd, Judge.

PETITION FOR TRANSFER TO THE SUPREME COURT
(Appellate Rule 11(B))

Come now appellants, who represent 716 taxpayers of the Southwest Parke Community School Corporation's taxing unit, and respectfully petition the Supreme Court of Indiana for transfer of the within cause, namely, Cause No. 1-777A151, from the Court of Appeals of Indiana, Division 1, to the Supreme Court of Indiana upon the following grounds and would show the Court:

1. That this is an action commenced by the plaintiffs on behalf of approximately 40 percent of the taxpayers of the Southwest Parke Community School Corporation which requested a determination that the actions of the defendants in determining to construct school facilities which would cost nearly as much as the assessed valuation of the taxing district be

declared to be arbitrary. After a hearing in the lower court, pursuant to the Public Lawsuits Act, I. C. 34-4-17-1 et seq., it was determined that appellants should post a bond in the sum of $300,000.00. Appellants sought to appeal this determination and timely filed the record of the proceedings and their brief on the merits pursuant to I. C. 34-4-17-6 and the Appellate Rules of Procedure. After the matter was fully briefed on the merits, the Indiana Court of Appeals, Division 1, refused to consider the appeal on the merits and instead dismissed the appeal, contending that under I. C. 34-4-17-5 it was incumbent upon the appellants to post the bond ordered by the trial court before the appeal could be considered upon the merits, despite the fact that appellants sought a review in the Court of Appeals of the very decision which ordered them to post such bond. Thus, on November 22, 1977, the Court of Appeals, Division 1, ordered appellants to show cause on or before December 12, 1977, why they should not post the bond ordered to be posted by the trial court, and appellants filed a Response to Rule to Show Cause on December 8, 1977. This Response is attached hereto as Exhibit A and made a part hereof. Thereafter, the Court of Appeals of Indiana, Division 1, dismissed this appeal by order dated January 24, 1978, which order is attached hereto as Exhibit B and made a part hereof. Appellants timely filed their petition for rehearing on February 9, 1978, which petition is attached hereto as Exhibit C and made a part hereof, and the Court of Appeals denied appellants' petition for rehearing on February 13, 1978.

2. That the ruling of the Court of Appeals, Division 1, in ordering appellants to post bond, in dismissing the appeal for failure to perform the act required by the trial court from which the appeal was taken, and in denying rehearing were all against appellants, who are seeking transfer.

3. That appellants timely filed their petition for rehearing following the order of dismissal and that rehearing was denied by the Court of Appeals on February 13, 1978. The decision of the Court of Appeals dated February 13, 1978, was mailed to

counsel for appellants, and under the provisions of Appellate Rules 13 and 12, a petition for transfer to this Court is due on or before March 10, 1978. In the event the Court determines that service by mail does not enlarge the time to file the petition for transfer by five days, the petition for transfer must be filed by March 6, 1978.

4. That the rulings of the Court of Appeals in ordering the appellants to show cause why the appeal should not be dismissed, in dismissing the appeal and in denying rehearing were erroneous for the following reasons:

(a) Said orders contravene the express provisions of Appellate Rule 6(B) which does not impose the requirement of the filing of an appeal bond to perfect an appeal from an interlocutory order.

(b) That the orders of the Court of Appeals required appellants to perform the very act which the trial court ordered them to perform and which is the subject of this appeal. As the record demonstrates, this is a public lawsuit, and the trial court ordered bond to be posted; appellants have taken this appeal in order to review the order that bond must be posted by them in the trial court. The effect of the Court of Appeal's rulings was to require appellants to moot the appeal by complying with the trial court's judgment before the Court will consider an appeal of the trial court's order. Thus, the Court of Appeal's orders and the dismissal of the appeal on January 24, 1978, would render appeals in public lawsuits impossible since compliance with the Court's order to post bond would have resulted in the issues in the trial court being rendered moot. Thus, appellants have no right of appeal at all since they were required to either suffer dismissal for non-compliance with the order to post bond or suffer dismissal because compliance therewith rendered the appeal moot. Such a Hobson's choice violates the constitutional guarantee to the taxpayers under both the Indiana and Federal Constitutions as hereinafter set forth.

(c) That the orders of the Court of Appeals requiring bond and the ruling of January 24, 1978, dismissing the action for failure to post bond are unduly burdensome and improperly require appellants to perform an act which they have heretofore demonstrated they cannot do. The Court, notwithstanding such showing, has ordered that an impossible task be done or the appeal be dismissed. This, too, deprived appellants of their right of appeal under the Indiana and Federal Constitutions.

(d) That the orders of the Court of Appeals contravened the express provisions of Appellate Rule 15(A)(2) in that the Court of Appeals disposed of this appeal by an order and not by a written opinion or by a written memorandum decision.

(e) That the orders of the Court of Appeals contravened the express provisions of Appellate Rule 15(A)(2) in that the orders decided a new principle of law without disposition by a written opinion.

(f) That the above-described orders of the Court of Appeals erroneously decided a new question of law by holding that appellants were required to post a bond to perfect an appeal on penalty of dismissal of the appeal without:

(i) statutory requirement for the posting of such bond;

(ii) judicial precedent for the posting of such bond; and

(iii) that appeals from interlocutory orders may be perfected without the posting of a bond.

(g) That the above orders of the Court of Appeals failed to give a statement in writing of the following pivotal and substantial questions arising on the record in violation of Article 7, Section 5 of the Constitution of Indiana:

(i) That appellants in a public lawsuit are required to post a bond to perfect an appeal from an interlocutory order; and

(ii) That the Court failed to make a statement in writing by which it is empowered by statute, rule or precedent that the posting of a bond in a public lawsuit is a prerequisite to perfecting an appeal from an order of a lower court requiring the posting of a bond by such appellant.

(h) That the above orders of the Court of Appeals failed to give a statement in writing of the following pivotal and substantial questions arising on the record, and the above orders of the Court of Appeals failed to give any reasons or statements in writing as grounds for the entry of said orders and particularly:

(i) In omitting to give a statement in writing on appellants' right to perfect an appeal as provided by the Public Lawsuits Act, I. C. Section 34-4-17-6; and

(ii) That the above orders of the Court of Appeals failed to give a statement in writing as respects the applicability of I. C. Section 34-1-58-1 through 34-1-58-6, which does not impose bond requirements to perfect an appeal as in a proceedings for mandate or prohibition.

(i) That the above orders of the Court of Appeals denied appellants the right of appeal as provided by I. C. Section 34-4-17-6, Appellate Rule 4(A) and 4(B)(5) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution, in violation of Article 7, Section 5 of the Indiana Constitution, and in violation of Appellate Rule 6(B).

(j) That the above orders of the Court of Appeals contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that:

(i) jurisdiction of the Court of Appeals of Indiana may only be exercised under such terms and conditions as the Supreme Court shall specify by rules and that there is no rule of the Indiana Supreme Court which provides for a proceedings for a rule to show cause; and

(ii) a single judge of the Court of Appeals has no jurisdiction to enter an order which adjudicates the issues sought to be reviewed on appeal.

(k) That the above orders of the Court of Appeals contravene the express provisions of Article 7, Section 6 of the Constitution of Indiana in that said orders denied to appellants an absolute right to one appeal.

(l) Neither a single judge nor the Court of Appeals has power to do anything which is not authorized by law and when a procedure is established by a special statute, the Court of Appeals' judicial functions are controlled thereby, and the remedy provided by such statute is confined to the mode prescribed and the procedure so provided excludes resort to any other or different procedure. The above orders of the Court of Appeals contravene and negate I. C. Section 34-4-17-6 and Article 7, Section 6 of the Constitution of Indiana.

(m) There is no statutory provision in a public lawsuit nor a rule of the Indiana Supreme Court which requires the posting of a bond as a condition precedent to judicial review.

(n) That the above orders of the Court of Appeals contravene Appellate Rule 15(A)(2)(c) in that the orders issued by the Court of Appeals resolved a legal issue of unique interest and of substantial public importance without disposition by a written opinion by the Court of Appeals.

5. That neither the Court of Appeals nor any counsel in this case has cited any decided opinion of the Court of Appeals or

this Court which construes I. C. 34-4-17-6 so that it is necessary that an appellant in a public lawsuit post the bond ordered by the trial court in order to obtain an appeal of the decision of the trial court requiring bond to be posted. For this reason, the rulings of the Court of Appeals erroneously decided a new question of law in addition to making the errors referred to above.

WHEREFORE, appellants respectfully petition the Court to grant transfer of this cause to the Supreme Court of Indiana, that the Supreme Court vacate and set aside the order of the Court of Appeals dismissing this appeal and require the Court of Appeals to consider the briefs and the record of proceedings which have already been filed in this matter, and to decide the issues raised in this appeal upon the merits, and for all other just and proper relief.

Respectfully submitted,

ROSENFELD, WOLFE & FREY
By /s/ ERIC A. FREY
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Attorneys for Appellants

APPENDIX VIII.

IN THE COURT OF APPEALS
of the State of Indiana

SARAH A. ARTHUR, ET AL., *Appellants (Plaintiffs Below),* *vs.* CLAY COMMUNITY SCHOOLS, ET AL., *Appellees (Defendants Below).*	No. 1-1177A270 Appeal from the Clay Circuit Court — Honorable David K. Johnson Special Judge

PETITION FOR TRANSFER TO THE SUPREME COURT
(Appellate Rule 11(B))

Come now appellants, 4,298 taxpayers of the Clay Community Schools' taxing unit, and respectfully petition the Supreme Court of Indiana for transfer of the within cause, namely, Cause No. 1-1177A270, from the Court of Appeals of Indiana, Division 1, to the Supreme Court of Indiana upon the following grounds and would show the Court:

1. That this is an action commenced by the plaintiffs on behalf of 4,298 taxpayers of the Clay Community Schools which requested a determination that the actions of the defendants in determining to construct school facilities which would cost more than the assessed valuation of the taxing district be declared to be arbitrary. The evidence indicated that the assessed valuation of the taxing district was approximately $42,000,000.00 and the payments under the proposed lease will amount to approximately $44,000,000.00. After a hearing in the lower court, pursuant to the Public Lawsuits Act, I. C. 34-4-17-1 et seq.,

it was determined that appellants should post a bond in the sum of $926,610.00. Appellants sought to appeal this determination and timely filed their praecipe and a motion to enlarge the time within which to file the record of the proceedings pursuant to I. C. 34-4-17-6 and the Appellate Rules of Procedue. The Indiana Court of Appeals, Division 1, took the motion for enlargement of time under advisement, refused to grant it, refused to consider the appeal on the merits and instead dismissed the appeal, contending that under I. C. 34-4-17-5 it was encumbent upon the appellants to post the bond ordered by the trial court before the appeal could be considered upon the merits, despite the fact that appellants sought a review in the Court of Appeals of the very decision which ordered them to post such bond. Thus, on November 23, 1977, the Court of Appeals, Division 1, ordered appellants to show cause on or before December 13, 1977, why they should not post the bond ordered to be posted by the trial court, and appellants filed a Response to Rule to Show Cause on December 8, 1977. This Response is attached hereto as Exhibit A and made a part hereof. Thereafter, the Court of Appeals of Indiana, Division 1, dismissed this appeal by order dated January 24, 1978, which order is attached hereto as Exhibit B and made a part hereof. Appellants timely filed their petitions for rehearing on January 9 and February 9, 1978, which petitions are attached hereto as Exhibit C and D and made a part hereof. The Court of Appeals denied appellants' petitions for rehearing on February 27, 1978.

2. That the ruling of the Court of Appeals, Division 1, in ordering appellants to post bond, in dismissing the appeal for failure to perform the very act required by the trial court from which the appeal was taken, and in denying rehearing were all against appellants, who are seeking transfer.

3. That appellants timely filed their petition for rehearing following the order of dismissal and that rehearing was denied by the Court of Appeals on February 27, 1978.

4. That the ruling of the Court of Appeals in ordering the appellants to show cause why the appeal should not be dismissed, in dismissing the appeal and in denying rehearing were erroneous for the following reasons:

(a) Said orders contravene the express provisions of Appellate Rule 6(B) which does not impose the requirement of the filing of an appeal bond to perfect an appeal from an interlocutory order.

(b) That the orders of the Court of Appeals required appellants to perform the very act which the trial court ordered them to perform and which is the sub- of this appeal. As the record demonstrates, this is a public lawsuit, and the trial court ordered bond to be posted; appellants have taken this appeal in order to review the order that bond must be posted by them in the trial court. The effect of the Court of Appeal's rulings was to require appellants to moot the appeal by complying with the trial court's order before the Court will consider an appeal of the trial court's order. Thus, the Court of Appeal's orders and the dismissal of the appeal on January 24, 1978, would render appeals in public lawsuits impossible since compliance with the Court's order to post bond would have resulted in the issues in the trial court being rendered moot. Thus, appellants have no right of appeal at all since they were required to either suffer dismissal for non-compliance with the order to post bond or suffer dismissal because compliance therewith rendered the appeal moot. Such a Hobson's choice violates the constitutional guarantee to the taxpayers under both the Indiana and Federal Constitutions as hereinafter set forth.

(c) That the orders of the Court of Appeals requiring bond and the ruling of January 24, 1978, dismissing the action for failure to post bond are unduly burden-

some and improperly require appellants to perform an act which they have heretofore demonstrated they cannot do. The Court, notwithstanding such showing, has ordered that an impossible task be done or the appeal be dismissed. This, too, deprived appellants of their right of appeal under the Indiana and Federal Constitutions.

(d) That the orders of the Court of Appeals contravened the express provisions of Appellate Rule 15(A)(2) in that the Court of Appeals disposed of this appeal by an order and not by a written opinion or by a written memorandum decision.

(e) That the orders of the Court of Appeals contravened the express provisions of Appellate Rule 15(A)(2) in that the orders decided a new principle of law without disposition by a written opinion.

(f) That the above-described orders of the Court of Appeals erroneously decided a new question of law by holding that appellants were required to post a bond to perfect an appeal on penalty of dismissal of the appeal without:

(i) statutory requirement for the posting of such bond;

(ii) judicial precedent for the posting of such bond; and

(iii) that appeals from interlocutory orders may be perfected without the posting of a bond.

(g) That the above orders of the Court of Appeals failed to give a statement in writing of the following pivotal and substantial questions arising on the record in violation of Article 7, Section 5 of the Constitution of Indiana:

(i) That appellants in a public lawsuit are required to post a bond to perfect an appeal from an interlocutory order; and

(ii) That the Court failed to make a statement in writing by which it is empowered by statute, rule or precedent that the posting of a bond in a a public lawsuit is a prerequisite to perfecting an appeal from an order of a lower court requiring the posting of a bond by such appellant.

(h) That the above orders of the Court of Appeals failed to give a statement in writing of the following pivotal and substantial questions arising on the record, and the above orders of the Court of Appeals failed to give any reasons or statements in writing as grounds for the entry of said orders and particularly:

(i) In omitting to give a statement in writing on appellants' right to perfect an appeal as provided by the Public Lawsuits Act, I. C. Section 34-4-17-6; and

(ii) That the above orders of the Court of Appeals failed to give a statement in writing as respects the applicability of I. C. Section 34-1-58-1 through 34-1-58-6, which does not impose bond requirements to perfect an appeal as in proceedings for mandate or prohibition.

(i) That the above orders of the Court of Appeals denied appellants the right of appeal as provided by I. C. Section 34-4-17-6, Appellate Rule 4(A) and 4(B) (5) in violation of appellants' constitutional rights as provided by the due process clause of the Fourteenth Amendment to the United States Constitution, in violation of Article 7, Section 5 of the Indiana Constitution, and in violation of Appellate Rule 6(B).

(j) That the above orders of the Court of Appeals contravened the express provisions of Article 7, Section 6 of the Constitution of Indiana in that:

(i) jurisdiction of the Court of Appeals of Indiana may only be exercised under such terms and conditions as the Supreme Court shall specify by rules and that there is no rule of the Indiana Supreme Court which provides for a proceedings for a rule to show cause; and

(ii) a single judge of the Court of Appeals has no jurisdiction to enter an order which adjudicates the issues sought to be reviewed on appeal.

(k) That the above orders of the Court of Appeals contravene the express provisions of Article 7, Section 6 of the Constitution of Indiana in that said orders denied to appellants an absolute right to one appeal.

(l) Neither a single judge nor the Court of Appeals has power to do anything which is not authorized by law and when a procedure is established by a special statute, the Court of Appeals' judicial functions are controlled thereby, and the remedy provided by such statute is confined to the mode prescribed and the procedure so provided excludes resort to any other or different procedure. The above orders of the Court of Appeals contravene and negate I. C. Section 34-4-17-6 and Article 7, Section 6 of the Constitution of Indiana.

(m) There is no statutory provision in a public lawsuit nor a rule of the Indiana Supreme Court which requires the posting of a bond as a condition precedent to judicial review.

(n) That the above orders of the Court of Appeals contravene Appellate Rule 15(A)(2)(c) in that the orders issued by the Court of Appeals resolved a legal issue

of unique interest and of substantial public importance without disposition by a written opinion by the Court of Appeals.

(o) That the Court of Appeals erred in failing and refusing to allow appellants an enlargement of time within which to file the Record of the Proceedings, and further erred in disposing of the case without having the record of the proceedings before the Court.

5. That neither the Court of Appeals nor any counsel in this case has cited any decided opinion of the Court of Appeals or this Court which construes I. C. 34-4-17-6 so that it is necessary that an appellant in a public lawsuit post the bond ordered by the trial court in order to obtain an appeal of the decision of the trial court requiring bond to be posted. For this reason, the rulings of the Court of Appeals erroneously decided a new question of law in addition to making the errors referred to above.

WHEREFORE, appellants respectfully petition the Court to grant transfer of this cause to the Supreme Court of Indiana, that the Supreme Court vacate and set aside the order of the Court of Appeals dismissing this appeal and require the Court of Appeals to permit the filing of the record of proceedings and briefs, and to decide the issues raised in this appeal upon the merits, and for all other just and proper relief.

Respectfully submitted,

ROSENFELD, WOLFE & FREY
By /s/ ERIC A. FREY
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Telephone: (812) 232-9691
Attorneys for Appellants

APPENDIX IX.

STATE OF INDIANA
Indianapolis, 46204
Telephone 633-5200

Clerk of the Supreme Court
and Court of Appeals

Billie R. McCullough, Clerk
217 State House

No. 1-777A151
Tolin, et al. v. Phillippi, et al.

You are hereby notified that the Supreme Court has on this day Denied Appellants Petition for Transfer. Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 4th day of May, 1978.

/s/ BILLIE R. MCCULLOUGH
Clerk Supreme Court and
Court of Appeals

APPENDIX X.

STATE OF INDIANA
Indianapolis 46204
Telephone 633-5200

Clerk of the Supreme Court
and Court of Appeals
Billie R. McCullough, Clerk
217 State House

No. 1-1177A270

Sarah A. Arthur, et al. v. Clay Community Schools, et al.

You are hereby notified that the Indiana Supreme Court has on this day Denied Appellant's "Petition to Transfer to the Supreme Court". Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 29th day of March, 1978.

/s/ BILLIE R. MCCULLOUGH
Clerk Supreme Court and
Court of Appeals

APPENDIX XI.

IN THE PARKE CIRCUIT COURT
1978 Term

STATE OF INDIANA } ss.
COUNTY OF PARKE }

ROY TOLIN, GERALD GARRARD, HERSHEL JACKSON, BARRY MORTON, MARVIN CASE and SEBA CASE,
Plaintiffs,

vs.

CARLTON L. PHILLIPPI, TAYLOR I. MORRIS, SR., and DURWOOD S. STRANG, as Commissioners of the State Board of Tax Commissioners of the State of Indiana, and THE SOUTHWEST PARKE COMMUNITY SCHOOL CORPORATION,
Defendants.

Cause No. 77-C-73

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Roy Tolin, et al., Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana denying transfer of the above action and affirming the decisions of the Indiana Court of Appeals which was entered in this action on the 4th day of May, 1978.

This appeal is taken pursuant to 28 U. S. C., Section 1257(2).

ROSENFELD, WOLFE & FREY
By /s/ ERIC A. FREY
Eric A. Frey
410 Star Building
Terre Haute, Indiana 47807
Telephone: (812) 232-9691
Attorneys for Roy Tolin, et al.,
Plaintiffs

APPENDIX XII.

IN THE SUPREME COURT
of the State of Indiana

SARAH A. ARTHUR, ET AL., *Appellants (Plaintiffs Below),* *vs.* CLAY COMMUNITY SCHOOLS, ET AL., *Appellees (Defendants Below).*	No. 1-1177A270 Appeal from the Clay Circuit Court. — Honorable David K. Johnson, Special Judge.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sarah A. Arthur, et al., Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana denying transfer of the above action and affirming the decisions of the Indiana Court of Appeals which was entered in this action on March 29, 1978.

This appeal is taken pursuant to 28 U. S. C., Section 1257(2).

/s/ ERIC A. FREY
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Telephone: (812) 232-9691
Attorney for Sarah A. Arthur, et al., Appellants